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# In the Supreme Court of the United States

October Term, [redacted] 1970

No. 625

ROBERT C. BIRMELIN,

*Petitioner,*

*vs.*

RAY BOYMER and MARY BOYMER,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### QUESTION PRESENTED FOR REVIEW

Respondents do not accede to Petitioner's statement of the question presented for review herein but submit that the question presented for review in this cause is correctly stated as follows:

> WHETHER ANY FEDERAL QUESTION WAS PRESENTED TO, OR WAS DECIDED BY, THE COURTS OF THE STATE OF FLORIDA IN THE INSTANT CAUSE.

## STATEMENT OF THE CASE

The symbol "P App." will be utilized to denote any reference to the Appendix attached to the Petition for Writ of Certiorari herein. The symbol "TC" will be utilized to denote any references to the certified copy of the trial court record furnished under separate cover by the clerk of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, in Case No. 67-18117. The symbol "AC" will be utilized to denote any references to the certified copy of the appellate court record furnished under separate cover by the clerk of the District Court of Appeal of Florida, Third District, in Case No. 68-913. The symbol "SC" will be utilized to denote any references to the certified copy of the record furnished under separate cover by the clerk of the Supreme Court of Florida in Case No. 39,226.

The Respondents, RAY BOYMER and MARY BOYMER, were the plaintiffs in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County and the appellants in the District Court of Appeal, Third District of Florida. The Petitioner, ROBERT C. BIRMELIN, was the defendant in the trial court and the appellee in the Florida Third District Court of Appeal.

The Respondents brought suit against the Petitioner upon a promissory note executed and delivered to them by the Petitioner (TC 1-2). The Petitioner, in his Answer, raised the affirmative defense of want of consideration (TC 3-4).

The Respondents and the Petitioner have been acquainted for a period in excess of 20 years. At one time

the Petitioner was employed as a mate upon a charter boat owned and captained by the Respondent, RAY BOYMER. In 1952, the Petitioner was admitted to the Florida Bar and has since been actively engaged in the practice of law in Dade County, Florida. The Petitioner represented the Respondents as their attorney on several occasions prior to 1958. During the latter part of that year the Respondent, RAY BOYMER, sold the vessel PLAYTIME owned by him to a person who was represented in that transaction by the Petitioner. The proceeds from the sale in the amount of TWENTY-ONE THOUSAND DOLLARS ($21,000.00) were paid over to the Petitioner as attorney and agent for the Respondents. The Petitioner disbursed approximately SIX THOUSAND DOLLARS ($6,000.00) of said proceeds to the Respondents. The Petitioner, acting as attorney and agent for the Respondents, retained the remaining sums and made investment loans on behalf of the Respondents.

The Petitioner, acting as attorney and agent for the Respondents, loaned ELEVEN THOUSAND DOLLARS ($11,000.00) of the Respondents' funds to CENTRAL INSURANCE AGENCY, INC. and another ONE THOUSAND DOLLARS ($1,000.00) of the Respondents' funds to SHALE DEVELOPMENT CORP. Both corporate borrowers were clients of the Petitioner. The Petitioner had represented CENTRAL INSURANCE AGENCY, INC. since 1956, and he testified that the principals in that corporation were JOHN P. SHALE and GRACE T. SHALE, his wife. The Petitioner organized SHALE DEVELOPMENT CORP. and was one of its officers, directors and stockholders together with the same JOHN P. SHALE and GRACE T. SHALE, his wife.

The Petitioner prepared the ELEVEN THOUSAND DOLLAR ($11,000.00) CENTRAL INSURANCE AGENCY, INC. promissory note (RT 1) and the ONE THOUSAND DOLLAR ($1,000.00) SHALE DEVELOPMENT CORP. promissory note (RT 2). Each of these notes was made payable to the Petitioner as "Trustee" and each note contained the following typewritten recitation:

> "This note is secured by assets of like value held by the corporation. Payment will be made by the corporation within six months upon demand."

However, the Petitioner took no security for the loans other than the promissory notes.

The Petitioner, acting as attorney and agent for the Respondents, serviced the SHALE DEVELOPMENT CORP. obligation and the CENTRAL INSURANCE AGENCY, INC. obligation and made disbursements to the Respondents through his office trust account. Subsequently, the SHALE DEVELOPMENT CORP. obligation was paid in full. However, CENTRAL INSURANCE AGENCY, INC. defaulted on its obligation, and no payments were made upon its promissory note after October, 1961. CENTRAL INSURANCE AGENCY, INC. became insolvent and is now defunct.

On February 27, 1962, the Petitioner, after conferring with the Respondent, RAY BOYMER, in regard to the CENTRAL INSURANCE AGENCY, INC. obligation, executed his promissory note to the Respondents (TC 2). The terms of said promissory note called for the payment of the principal sum of TEN THOUSAND DOLLARS ($10,000.00) together with interest at six percent per

annum by the Petitioner to the Respondents three years after the date of the execution of the note. Subsequently, in 1966, demand was made on the Petitioner for payment of his promissory note, but the Petitioner refused to pay the note.

The cause was tried without a jury. The Petitioner was called by the Respondents to testify as an adverse witness, and he also testified as a witness in his own behalf. The Respondents testified in their own behalf. No other witnesses appeared and testified. The testimony offered by the Respondents and the Petitioner was divergent in many respects and, in particular, was conflicting in regard to the circumstances regarding the execution and delivery of the Petitioner's promissory note to the Respondents. The Respondent, BOYMER, testified that the note was prepared, executed and delivered by the Petitioner after he told the Petitioner that if the Petitioner could not help him in the matter that he would have to go before the Bar Association (TC 93 - 95). The Petitioner testified that he had executed the note out of a sense of moral obligation to try to do whatever he could to see that a part of the Respondents' investment was returned (TC 71 - 74).

Thereafter, the trial judge entered a final judgment in favor of the Petitioner and against the Respondents (TC 173). Whereupon, the Respondents appealed the final judgment to the District Court of Appeal, Third District of Florida which reversed the decision of the trial court and directed that a judgment be entered in favor of the Respondents (AC 72 - 79; P App. 23 - 32). The Petitioner then filed his Petition for Rehearing (AC 80 - 83; P App. 33 - 37) which was denied without opinion (AC 85; P App. 41).

Subsequently, the Petitioner filed in the Supreme Court of Florida his Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida (SC Item 1 1 - 5; P App. 43 - 48) which was denied (SC Item 6; P App. 59). The Florida Supreme Court's memorandum opinion denying certiorari is reported at 237 So.2d 537. The Petition for Rehearing (SC Item 7 1 - 2; P App. 61 - 62) filed in the state Supreme Court was also denied without opinion (SC Item 8; P App. 63).

Thereupon, Petitioner filed his Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District in this Supreme Court of the United States.

## ARGUMENT

The Petitioner in the instant cause seeks to invoke the jurisdiction of this Supreme Court under Title 28, U.S.C. § 1257(3) to review by writ of certiorari final judgments or decrees rendered by the highest court of a state in which a decision could be had where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States. In essence, the Petitioner contends that the appellate courts of Florida refused to apply well established principles of appellate review in this cause simply because the Petitioner was an attorney in violation of the due process and equal protection provisions of Amendment XIV to the Constitution of the United States. However, the record before this Court clearly reflects that no such contention was ever presented to, or decided by, the state courts at any stage of the proceedings in this cause, and no title, right, privilege or immunity was specially set up or claimed by the Petitioner under the federal Constitution in the state courts.

The fact that the power of the Supreme Court to review decisions of state courts is limited to the review of those which involve federal questions and rights is too well established to require citation. Equally fundamental is the principle that the Supreme Court cannot entertain a question not raised in the state court below nor not actually decided by that court; that is, the Supreme Court is without jurisdiction to pass upon a contention as to state violation of federal Constitutional rights, or upon any federal question, where the record indicates that the issue was neither raised nor considered by the state courts. See *e.g. Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Ellis v. Dixon*, 349 U.S. 458 (1954); *Edelman v. California*, 344 U.S. 357 (1952); *Durley v. Mayo*, 351 U.S. 277 (1955); *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.*, 360 U.S. 334 (1959); *Hanson v. Denckla*, 357 U.S. 235 (1958); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154 (1945); *Wilson v. Cook*, 327 U.S. 474 (1945); *CIO v. McAdory*, 325 U.S. 472 (1944); *Hooker v. Los Angeles*, 188 U.S. 314 (1902); *Dewey v. Des Moines*, 173 U.S. 193 (1899); *Honeyman v. Hanan*, 300 U.S. 14 (1936). Moreover, this Supreme Court has consistently held that its jurisdiction to examine the final judgments of state courts cannot arise from inference or surmise but only from averments so distinct and positive as to place it beyond question that that party bringing the case up for review intended to assert a federal right in the state court. See *e.g. F. G. Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Levy v. Superior Ct.*, 167 U.S. 175 (1897); *Kipley v. Illinois*, 170 U.S. 182 (1897).

Rule 23(1)(f) of the Supreme Court Rules, recognizing the principles enunciated above, provides that where

review of the judgment of a state court is sought, the statement of the case contained in a petition for certiorari must specify the stage at which and the manner in which the federal questions sought to be reviewed were raised in the state courts, the method of raising them, and the way in which they were passed upon by the state courts, with such pertinent quotations of specific portions of the record as will show that the federal questions were timely and properly raised so as to give this Supreme Court jurisdiction to review the judgment.

It is evident that the statement of the case contained in the petition for certiorari filed herein does not comply with the requirements of Rule 23(1)(f). The various quotations taken from Petitioner's briefs and petitions for rehearing filed in the state appellate courts and set out in Petitioner's statement of the case do not give the slightest indication that the Petitioner raised the asserted federal question set out in the petition for certiorari, or raised the contention that the state appellate courts disregarded established principles of appellate review in violation of Petitioner's Fourteenth Amendment rights to due process of law or equal protection of the laws, or raised any other federal question for consideration by the state courts below. Certainly, there is a complete dearth of statements so distinct and positive as to place it beyond question that the Petitioner intended to assert a federal right in the state courts. Furthermore, there is no indication that the state courts below actually considered any federal question. This lack of compliance with Rule 23(1)(f) is not the result of an oversight on Petitioner's part, but results from the fact that Petitioner's contention that the state appellate courts violated his Fourteenth Amendment rights to due process of law and to the equal protection of the laws was never raised or considered in the state courts.

The trial court entered a final judgment in favor of the Petitioner, and no hint of any federal question appears in the trial court record (TC 1 - 178). It is equally clear that no federal question was presented to the District Court of Appeals, Third District of Florida. Neither the federal question asserted in the petition for certiorari pending herein nor any other federal question was presented by Respondents' assignments of error (TC 175), by Respondents' brief (AC 1 - 38) and reply brief (AC 53 - 71) of appellants or by Petitioner's brief of appellee (AC 39 - 52; P App. 9 - 22). On the contrary, the assignments of error and the briefs were strictly confined to issues of state law. Basically, Respondents, as appellants, contended in their briefs that the Petitioner, under Florida law, had failed to prove his affirmative defense of want of consideration for his promissory note given to Respondents by substantial competent evidence. On the other hand, Petitioner, as appellee, argued his brief that there was sufficient evidence under Florida law to support the judgment of the trial judge sitting as a trier of fact. None of the briefs made any reference to the Constitution of the United States, to any federal Constitutional rights, to Fourteenth Amendment rights of due process of law and equal protection of the laws, or to any other federal question.

It is also clear that no federal question was decided by the state district court of appeal. The most cursory examination of the decision of the district court of appeal (AC 72 - 79; P App. 23 - 32) reveals that there is no trace of a federal question and that the appellate court restricted itself to the question of whether there was substantial evidence to support the judgment of the trial court. As the appellate court stated:

"On this appeal from the judgment in favor of the defendant, the determinative question is whether there was substantial competent evidence to support the conclusion reached by the trial judge that the affirmative defense of want of consideration was established. Primarily it must be noted that on the issue created by that affirmative defense, notwithstanding its presentation in the case in the form of a sworn answer, the defendant had the burden of establishing the defense by a preponderance of the evidence. See Biro v. Geiser, Fla. 1967, 199 So.2d 461, so holding because of the existence and effect of Rule 1.110(d), RCP, 30 F.S.A.

In our view the trial court was in error in holding that the defendant successfully met that burden, and that want of consideration was established by a preponderance of the evidence —a necessary holding in granting judgment for the defendant." (AC 77, App. 30-31)

Nor did the petition for rehearing (AC 80-85; P App. 33-37) or the petition for certification of question as one involving a question of great public interest (AC 84; P App. 39), filed in the District Court of Appeal after that court reversed the trial court's judgment and instructed the trial court to enter judgment for Respondents, challenge the appellate court's decision as violative of Petitioner's Fourteenth Amendment rights or any other of his federal rights.

The petition for certification merely requested the District Court of Appeal to certify the cause to the Florida

Supreme Court under Article V § 2 of the Florida Constitution, providing for review by that court of cases certified as involving a question of great public interest, as one involving "important questions concerning the obligation of attorneys and the standards to be applied in asserting their rights as litigants in the trial and appellate courts of our state" (AC 84; P App. 39). The language of the petition for certification in no way intimates that the alleged questions "of great public interest" sought to be certified concerned any federal question.

The petition for rehearing contains no reference to any federal Constitutional rights, and it is apparent that the Petitioner's assertion that the appellate court's decision represented ". . . a complete and unique departure from virtually every established principle of appellate review. . . ." (AC 80; P App. 33) does not constitute a claim that the appellate court's decision violated any of Petitioner's federal Constitutional rights. It is also apparent that Petitioner's speculation that the appellate court ". . . concluded that the usual view as to the resolution of conflicting testimony by the finder of fact, and the role of the appellate court in reviewing such conclusions. . . ." (AC 83; P App. 36) was inapplicable because of the existence of an attorney-client relationship and Petitioner's assertion based upon said speculation that the appellate court had overlooked the cases holding that the existence of an attorney-client relationship does not affect the right of the trial judge to believe the attorney's testimony did not raise the claim presented in the petition for certiorari pending herein that the appellate court's decision violated Petitioner's federal Constitutional rights. In fact, it is clear that the petition for rehearing was grounded entirely in state law since there is no allusion to the federal Con-

stitution, the Fourteenth Amendment, or rights of due process of law and equal protection of the laws and since the only citations of authority were decisions of the state courts involving state principles of appellate review.

The Petitioner's petition for writ of certiorari to the District Court of Appeal, Third District, filed in the Supreme Court of Florida (SC Item 1, 1-5; P App. 43-48) presents essentially the same situation. In that petition for certiorari, the Petitioner sought to invoke the jurisdiction of the state supreme court under Article V, Section 4 of the Florida Constitution providing for review by certiorari of any decision of a district court of appeal that is in direct conflict with another district court of appeal or of the supreme court on the same point of law. In his petition for certiorari the Petitioner asserted "direct conflicts" with state court decisions on two points of law. First, the Petitioner claimed that the decision of the appellate court was in "direct conflict" with the decisions in *Chakford v. Strum*, 87 So.2d 419 (Fla., 1956) and *Lowrey v. Rosenberg*, 147 So.2d 321 (Fla., 1st D.C.A., 1962) holding that the decision of a trial judge, sitting as a finder of fact, must be affirmed if there is competent, substantial evidence, whether contradicted or not, to support it; and that an appellate court may not properly reassess the evidence or substitue its independent judgment concerning the creditability of witnesses for that of the trial judge (SC Item 1 4; P App. 46). Second, the Petitioner claimed that the appellate court decision, ". . . insofar as it concluded that the usual view as to resolution of conflicting testimony by the finder of fact, and the role of an appellate court in reviewing such conclusions does not apply because the transaction involved was one between an attorney and his client. . . ." was in "direct conflict" with the

decisions in *Davant v. Lambdin*, 135 Fla. 700, So.201 (1939) and *Philip v. Griffith*, 100 So.2d 197 (Fla., 2nd D.C.A., 1958) (SC Item 1 6-7; P App. 47). However, Petitioner did not assert, either expressly or by implication, that the decision of the appellate court violated his federal Constitutional right to due process of law and equal protection of the laws, and it is manifestly clear that the assertions of "direct conflict" with the cited state court decisions dealing with principles of state law did not present any federal question to the state supreme court.

Equally devoid of any federal question were the Petitioner's brief in support of the jurisdiction of the state supreme court to entertain his petition for certiorari (SC Item 2 1-10; P App. 49-58), Respondents' opposing brief (SC Item 41-23) and Petitioner's petition for rehearing filed in the state supreme court (SC Item 7 1-2; P App. 61-62). The Petitioner's brief merely presented expanded argument in support of his assertion that the lower appellate court decision was in "direct conflict" with other state court decisions. Respondents' brief simply rebutted Petitioner's assertions of "direct conflict" by demonstrating that the lower court had not applied any aberrant principles of appellate review but that its decision was entirely consistent with the state court decisions cited by the Petitioner and the principles of appellate review established in the state appellate courts. Moreover, the petition for rehearing submitted to the state supreme court simply repeated the assertions presented by Petitioner in his petition for certiorari and in his brief in support of jurisdiction. Obviously, no claim of any federal Constitutional right was raised, discussed or even mentioned in either of the briefs or in the petition for rehearing.

In sum, the record before this Supreme Court in the instant cause affirmatively indicates that no federal Constitutional right was ever claimed or specially set up by Petitioner in the state courts below, and it is firmly established that this Supreme Court will not decide federal Constitutional issues raised for the first time before it on review of state court decisions. See *e.g. Cardinale v. Louisiana*, 394 US 437 (1969) and cases cited therein.

## CONCLUSION

The Respondents respectfully submit that the Petition For a Writ of Certiorari To The District Court of Appeal of Florida, Third District pending herein should be denied.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition has been furnished by United States Mail, on this 24 day of September, 1970 to HAROLD MENDELOW, c/o DAVID F. CERF, JR., 803 Biscayne Building, Miami, Florida 33130, Attorneys for Petitioner.

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